Office-Supreme Court, U.S.
FILED
MAR 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1052

In the Supreme Court of the United States

OCTOBER TERM, 1982

OLD BEN COAL COMPANY, PETITIONER

v.

CORNELIUS J. BLAIZE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JANICE B. CORWIN
Attorney
Department of Labor
Washington, D. C. 20210

QUESTIONS PRESENTED

1. Whether an employer who has been relieved of liability for payment of black lung benefits by the 1981 amendments to the Black Lung Benefits Act and the Internal Revenue Code of 1954, and dismissed as a party in the court of appeals, has standing in this Court to contest a claimant's eligibility for benefits.

2. Whether, having dismissed the appeal for lack of a case or controversy, the court of appeals properly vacated as moot the decisions of the administrative law judge and the Benefits Review Board.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 2

Argument 5

Conclusion 11

TABLE OF AUTHORITIES

Cases:

A.L. Mechling Barge Lines v. *United States*, 368 U.S. 324 8

Director, OWCP v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983) 9

Flast v. *Cohen*, 392 U.S. 83 7

Kalaris v. *Donovan*, 697 F.2d 376 (D.C. Cir. 1983) 9

United States v. *Munsingwear*, 340 U.S. 36 ..... 7-8, 9

Constitution, statutes, regulations, and rule:

U.S. Const., Art. III 5, 7

Act of Dec. 29, 1981, Pub. L. No. 97-119, 95 Stat. 1635 *et seq.* 3

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 *et seq.* 2

Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. (& Supp. V) 801 *et seq.*:

Page

Constitution, statutes, regulations, and rule—Continued:

Title IV, 30 U.S.C. (& Supp. V) 901 *et seq.*:

Section 402(i)(1), 30 U.S.C. (& Supp. V) 902(i)(1) 6

Part B, 30 U.S.C. (& Supp. V) 921-925:

Section 45, 30 U.S.C. 915 2

Part C, 30 U.S.C. (& Supp. V) 931-945:

Section 422, 30 U.S.C. (Supp. V) 932 3
Section 422(a), 30 U.S.C. (Supp. V) 932(a) 3, 10
Section 422(c), 30 U.S.C. (Supp. V) 932(c) 3, 6, 7, 8
Section 422(c)(2), 30 U.S.C. (Supp. V) 932(c)(2) 3, 6
Section 423, 30 U.S.C. (& Supp. V) 933 ..... 6, 7
Section 424(b)(1), 30 U.S.C. (Supp. V) 934(b)(1) 5, 9
Section 435, 30 U.S.C. (Supp. V) 945 ..... 3, 7, 9
Section 435(a)(1)(B), 30 U.S.C. (Supp. V) 945(a)(1)(B) 2
Section 435(a)(3)(A), 30 U.S.C. (Supp. V) 945(a)(3)(A) 2

28 U.S.C. 1254(1) 5, 7

33 U.S.C. 921(c) 3, 10

33 U.S.C. 922 10

Page

Constitution, statutes, regulations, and rule—Continued:

20 C.F.R.:

Part 718 10
Section 725.351(a)(1) 9
Section 725.410(a)-(b) 9, 10
Section 725.411 9
Section 725.412(a) 10
Section 725.482(a)(b) 9

20 C.F.R.:

Section 801.102-801.104 9
Section 802.410(b) 9

Fed. R. App. P. 42(b) 3

Miscellaneous:

S. Rep. No. 95-209, 95th Cong., 1st Sess. (1977) 6

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1052

OLD BEN COAL COMPANY, PETITIONER

v.

CORNELIUS J. BLAIZE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 3-5) is unreported. The decision and order of the Benefits Review Board (Pet. App. 6-32) are reported at 3 Black Lung Rep. (MB) 1-710. The opinion and order of the administrative law judge (Pet. App. 33-45) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 16, 1982. A petition for rehearing was denied on September 22, 1982 (Pet. App. 1-2). The petition for a writ of certiorari was filed on December 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See pages 5-7, *infra*.

STATEMENT

1. In March 1973, respondent Cornelius J. Blaize applied for benefits under "Part B" of Title IV of the Federal Coal Mine Health and Safety Act of 1969 (the Act), as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. 921-925. The claim was ultimately denied by the Social Security Appeals Council of the Department of Health, Education, and Welfare in September 1975 (Pet. App. 7-8 n.1; *id.* at 34).

In July 1974, while his initial claim was pending, Blaize filed with the Department of Labor a second claim for benefits under "Part C" of Title IV of the Act, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. 931-945.[1] Before this claim was determined, the Act was amended by the Black Lung Benefits Reform Act of 1977 (the Reform Act), Pub. L. No. 95-239, 92 Stat. 95 *et seq.*, to provide for review of previously denied "Part B" claims under new and expanded eligibility criteria. Blaize elected to have his previously denied "Part B" claim reviewed by the Department of Labor in accordance with Section 435(a)(1)(B) of the Act as amended by the Reform Act, 30 U.S.C. (Supp. V) 945(a)(1)(B). His "Part B" claim was then transferred to the Department of Labor and merged with his pending "Part C" claim. A deputy commissioner of the Office of Workers' Compensation Programs (OWCP) determined that Blaize was entitled to benefits under the Act as amended by the Reform Act, 30 U.S.C. (Supp. V) 945(a)(3)(A) and (b)(1), and identified petitioner Old Ben Coal Company as the

---

[1] Part "B" of the Act applies to claims filed on or before June 30, 1973; these claims were to be adjudicated by the Social Security Administration. Part "C" applies to claims filed after December 31, 1973; these claims were to be adjudicated by the Department of Labor (DOL). Claims filed between July 1, 1973 and December 31, 1973, were to be adjudicated by DOL under Section 415 of the Act.

"responsible operator" (Pet. App. 8 n.1; *id.* at 34). Petitioner contested the award and requested a formal hearing before an administrative law judge (ALJ).

On February 28, 1980, after a hearing, the administrative law judge found that Blaize was entitled to benefits (Pet. App. 33-43). Petitioner appealed the decision to the Benefits Review Board (the Board), which, by a divided vote, reversed the decision and order of the administrative law judge and denied benefits (*id.* at 6-32).

2. Blaize and the Director, OWCP, sought review of the Board's decision in the court of appeals pursuant to 33 U.S.C. 921(c), as incorporated by 30 U.S.C. (Supp. V) 932(a). While this appeal was pending, the Act was amended once again by the 1981 amendments to the Black Lung Benefits Act and the Internal Revenue Code of 1954, Act of Dec. 29, 1981, Pub. L. No. 97-119, 95 Stat. 1635 *et seq.* Section 205(a)(1) of Title II of the 1981 amendments, which amends Section 422 of the Black Lung Benefits Act, was designed to relieve individual coal mine operators of unanticipated liabilities arising from application of the expanded eligibility criteria of the Reform Act when previously denied claims were reviewed under Section 435 of the Act.[2] Because Section 422(c), 30 U.S.C. (Supp. V) 932(c), relieved petitioner of all potential liability for Blaize's merged claims, the Director moved, pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, to dismiss petitioner as a party, to dismiss the appeal, and to

---

[2]Section 422(c)(2), 30 U.S.C. (Supp. V) 932(c)(2), relieves employers of liability for payment of claims that were denied prior to March 1, 1978, as occurred in this case. It transfers liability for payment of these previously denied claims to the Black Lung Disability Trust Fund (Trust Fund). If such claims are approved upon review under Section 435, 30 U.S.C. (Supp. V) 945, the Trust Fund, and not the employer, pays the benefits. Respondent Blaize's merged claims were reviewed and approved by the deputy commissioner under Section 435.

vacate the decision of the Benefits Review Board and remand the case to the deputy commissioner for assumption of liability by the Trust Fund.[3] Petitioner agreed that it should be dismissed as a party and that the appeal should be dismissed, since the 1981 amendments had removed its stake in the outcome of the proceedings and had rendered moot the issue of its liability. However, petitioner opposed the portion of the Director's motion that sought vacation of the Board's decision and a remand for assumption of liability by the Trust Fund.

The court of appeals granted the Director's motion (Pet. App. 3-5). It dismissed petitioner as a party, dismissed the appeal, and vacated the orders of the Benefits Review Board and the administrative law judge. The court noted that "[a]ll parties agree that Old Ben Coal must be dismissed as a party since the Revenue Act [1981 Amendments], Title II, §205 relieves the operator of liability and requires that the type of claim asserted here be presented to the Secretary of Labor for review, with benefits to be paid by the Black Lung Disability Trust Fund if approved by the Secretary" (Pet. App. 4). In explaining its decision to vacate the decisions of the Benefits Review Board and the administrative law judge, the court stated that "[t]he Revenue Act requires this court not only to dismiss this appeal but also to vacate all adjudicatory proceedings below in which Old Ben was the only party to contest the initial administrative finding" of entitlement by the deputy commissioner (*id.* at 5). The court rejected petitioner's contention that the 1981 amendments required the Director to be bound by the decision of the Benefits Review Board denying Blaize's claim of entitlement, reasoning that "Blaize and the Director should not be bound by an order of the Board when appellate review

---

[3]Blaize did not object to this motion.

fails because of intervening mootness" (*ibid.*). The court concluded that "[s]ince the initial finding of eligibility is not affected, and since the Director takes the position that Blaize is entitled to black lung benefits, we assume that appropriate action will be taken to transfer liability for payment to the Trust Fund" (*ibid.*).

ARGUMENT

The petition should be denied because, under settled principles, petitioner lacks standing to contest the issue of respondent Blaize's entitlement to black lung benefits. The court of appeals properly granted the Director's motion to dismiss petitioner as a party and to dismiss the appeal as moot because Section 205(a)(1) of Title II of the 1981 amendments, enacted during the pendency of the appeal, relieved petitioner of all potential liability for payment of benefits to Blaize. In its response to the Director's motion, petitioner agreed that it should be dismissed as a party and that the appeal should be dismissed; petitioner does not question its dismissal as a party even now. In these circumstances, petitioner may not invoke this Court's jurisdiction under 28 U.S.C. 1254(1), and this case does not present a case or controversy as required by Article III of the Constitution.

1. Petitioner is expressly barred by Section 424(b)(1) of the Black Lung Benefits Act, 30 U.S.C. (Supp. V) 934(b)(1), from participating in any action brought to determine claims for benefits to be paid by the Black Lung Disability Trust Fund. That statute provides in pertinent part:

> No operator or representative of operators may bring any proceeding, or intervene in any proceeding, held for the purpose of determining claims for benefits to be paid by the fund, except that nothing in this section

> shall affect the rights, duties, or liabilities of any operator in proceedings under section [422] or section [423] of this title. In a case where no operator responsibility is assigned pursuant to section [422] and [423] of this title, a determination by the Secretary that the fund is liable for the payment of benefits shall be final.

The legislative history of this provision clearly demonstrates that Congress intended to preclude operators from participating in litigation concerning payments by the Trust Fund:

> While operators, by means of the tax levied against the sale or use of the coal they produce, pay into the fund, the operators are to have no title or interest in the fund assets; and operators will have no right to litigate any questions concerning the assignment of claims to the fund or the payment of benefits out of the fund's assets.

S. Rep. No. 95-209, 95th Cong., 1st Sess. 7 (1977).

Respondent Blaize's claim is one in which "no operator responsibility is assigned" pursuant to Sections 422 and 423. Section 422(c)(2), as amended by Section 205(a)(1) of Title II of the 1981 amendments, provides in pertinent part that "no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis * * * which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of [Section 435]." 30 U.S.C. (Supp. V) 932(c)(2). Blaize's "Part B" claim was denied by the Social Security Appeals Council of the Social Security Administration in September 1975 (Pet. App. 8); it thus clearly falls within the relevant statutory definition of a "claim denied" as one that was "denied by the Social Security Administration." 30 U.S.C. (Supp. V) 902(i)(1). Under Section 422(c),

as amended, once Blaize's "Part B" claim was denied by the Social Security Administration and merged with his pending "Part C" claim for review under Section 435, petitioner was no longer even potentially liable for payment of benefits because, even if the claim were subsequently approved, the Trust Fund would pay it.[4]

In light of this background, petitioner does not question that it was properly dismissed as a party in the court of appeals since Section 422(c) of the Act as amended relieved petitioner of liability for payment of Blaize's claim.[5] Because the Director agrees that Blaize is entitled to benefits, there no longer is an adversarial relationship or a case or controversy as required by Article III of the Constitution. See *Flast* v. *Cohen*, 392 U.S. 83, 94-95 (1968). Furthermore, because petitioner was properly dismissed as a party by the court of appeals, it may not seek to invoke this Court's jurisdiction pursuant to 28 U.S.C. 1254(1), which authorizes this Court to review cases in the courts of appeals "[b]y writ of certiorari granted upon the petition *of any party* to any civil * * * case * * *" (emphasis added).

2. Having recognized that petitioner no longer had a legally cognizable interest in the outcome of the case, the court of appeals properly applied the doctrine of *United*

---

[4]Section 423, 30 U.S.C. (& Supp. V) 933, concerns insurance coverage requirements for operators found liable for payments under Section 422 and is therefore inapplicable to the instant case.

[5]Petitioner, in its response to the Director's motion to dismiss the appeal, conceded (at 7-8) that "Section 205 removes Old Ben's 'concrete stake in the outcome of the case' [citation omitted] * * *. Whether this Court affirms or reverses the Board's decision, Old Ben has no liability for payment of benefits as a result of enactment of Section 205. Thus, as to Old Ben, the issue of liability is moot. Accordingly, Old Ben is no longer a party adversely affected or aggrieved by the Board's decision."

States v. *Munsingwear*, 340 U.S. 36, 39 (1950), in which this Court stated:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is * * * to vacate the judgment below and remand with a direction to dismiss.

Accord, *A.L. Mechling Barge Lines* v. *United States*, 368 U.S. 324, 329 (1961) (*Munsingwear* procedure "equally applicable to unreviewed administrative orders"). The purpose of this procedure, as explained in *Munsingwear* (340 U.S. at 40-41), is to clear

> the path for future relitigation of the issues between the parties and [to] eliminate[] a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of the parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Petitioner contends that the court of appeals should not have applied the *Munsingwear* doctrine to the instant case because the case was not entirely mooted pending appeal. Specifically, petitioner argues (Pet. 11-12) that the issue of Blaize's entitlement to benefits and the issue of the procedural requirements for a claim to be "approved" under Section 422(a) of the Act as amended are still alive. However, the crucial point—overlooked by petitioner—is that there no longer is a live controversy among the parties to this case, a point that petitioner appears to have conceded below. See note 5, *supra*. As previously explained, under Section 422(c) of the Act as amended, 30 U.S.C. (Supp. V) 932(c), once respondent Blaize's "Part B" claim was denied by the Social Security Administration and merged with his pending "Part C" claim for review under Section 435, petitioner

was no longer even potentially liable for repayment of benefits; thus, even if the claim were subsequently approved, payment would be made by the Trust Fund.[6]

Petitioner also contends (Pet. 7-9) that the *Munsingwear* doctrine should not have been applied because the purposes served by the doctrine are not present here. In support of this contention, petitioner argues that the Board's order denying settlement has a limited res judicata effect, will not be applied to any collateral proceedings, and will not unfairly prejudice respondent Blaize. Contrary to petitioner's contention, however, the Board's order does have consequences adverse to the Director and to Blaize. First, the

---

[6]There is no merit to petitioner's assertion (Pet. 8, 13) that Blaize's claim was not "approved" for payment by the Trust Fund because it was the Board that rendered the final decision of the Secretary of Labor and the Board determined that Blaize was ineligible for benefits. Petitioner fails to recognize that the Board is an independent, quasi-judicial body within the Department of Labor. 20 C.F.R. 801.102-801.104; cf. *Kalaris* v. *Donovan*, 697 F.2d 376 (D.C. Cir. 1983). Like any other party, the Director appears before the Board and has a right to seek review in the courts of appeals of adverse decisions rendered by the Board. 20 C.F.R. 725.482(a)(b). More importantly, petitioner overlooks the fact that under Section 424(b)(1) of the Act, 30 U.S.C. (Supp. V) 934(b)(1), "[i]n a case [such as this] where no operator responsibility is assigned pursuant to Section [422] [as amended] * * * a determination by the Secretary that the fund is liable for the payment of benefits shall be final." Contrary to petitioner's contention (Pet. 15 n.8), the Director is the designee of the Secretary responsible for administration and enforcement of the Black Lung Benefits Act. 20 C.F.R. 802.410(b); see *Director, OWCP* v. *Perini North River Associates*, No. 81-897 (Jan. 11, 1983), slip op. 5 n.10. The deputy commissioner is authorized by the Director to make initial determinations with respect to claims, subject to review upon further development of the record, according to procedures established by the implementing regulations. See 20 C.F.R. 725.351(a)(1). In this case, the deputy commissioner issued an initial finding of entitlement with respect to respondent Blaize's claim in accordance with 20 C.F.R. 725.410(a)-(b), 725.411.

Board's decision that emphyzema may not qualify as statutory pneumoconiosis (Pet. App. 16) has precedential value adverse to the Director. Second, Blaize will have been effectively denied his statutory right of review of the Board's decision in the court of appeals. See 33 U.S.C. 921(c), as incorporated by 30 U.S.C. (Supp. V) 932(a). While Blaize retains the right to petition for modification of the Board's decision, his entitlement to such relief is conditioned on a showing "of a change in conditions or * * * a mistake in a determination of fact" by the Board. 33 U.S.C. 922, as incorporated by 30 U.S.C. (Supp. V) 932(a). Finally, if Blaize files a new application for benefits, his claim will be subject to the more rigorous eligibility criteria of 20 C.F.R. Part 718, applicable to all claims filed after March 1, 1980, and to additional eligibility and evidentiary requirements imposed by the 1981 amendments.

Petitioner finally contends (Pet. 14-17) that if the *Munsingwear* doctrine is found to be applicable in this case, the court of appeals' order should be modified so as to vacate the deputy commissioner's initial finding of eligibility as well as the subsequent orders of the ALJ and the Board. As the court of appeals correctly pointed out (Pet. App. 4-5), however, the initial finding was made by the deputy commissioner prior to identification of petitioner as the responsible operator and, therefore, prior to the point in time at which any rights or liabilities of petitioner attached. See 20 C.F.R. 725.410(a)-(b), 725.412(a). In these circumstances, the initial finding predates the controversy and need not be expunged.[7]

---

[7]Although the court of appeals left the Director's initial finding of eligibility undisturbed, we do not interpret its decision as a general ruling that the Director is bound by his initial finding whenever the intervening mootness doctrine applies so as to require the vacation of subsequent adjudicatory proceedings. Here, the court of appeals did not order the Director to make payment from the Trust Fund. Rather,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

T. TIMOTHY RYAN, JR.
Solicitor of Labor

KAREN I. WARD
Associate Solicitor

ALLEN H. FELDMAN
Counsel for Appellate Litigation

JANICE B. CORWIN
Attorney
Department of Labor

MARCH 1983

---

the court stated that "[s]ince the initial finding of eligibility is not affected [by its order] and since the Director takes the position that Blaize is entitled to black lung benefits, *we assume that appropriate action will be taken to transfer liability for payment to the Trust Fund*" (Pet. App. 5; emphasis added). Thus, the court's order is consistent with the Director's position that in cases such as the present one, he retains flexibility to reassess his initial finding. In the instant case, no formal reassessment is necessary, however, since the administrative record was thoroughly developed, and the Director consistently has adhered to the position that Blaize is entitled to benefits.